Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States

RONALD JACKSON,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Criminal Appeals of the State of Texas erred in failing to resolve the disruptive split of authority between numerous Texas courts of appeals as to the proper interpretation to be given to pre-1997 State of Texas violations of *Article 32.01 and Article 28.061* of the Texas Rules of Criminal Procedure.

PARTIES BELOW

The parties before this Court are petitioner Ronald Jackson, and respondent the State of Texas.

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PETITION FOR WRIT OF CERTIORARI

Ronald Jackson respectfully submits this petition for a writ of certiorari to review the judgment and opinion of the Texas Court of Criminal Appeals and the Court of Appeals for the Seventh District of Texas at Amarillo, Texas, filed on February 23, 1998.

OPINION BELOW

The Court of Criminal Appeals of the State of Texas refused to consider the petition for discretionary review without a written opinion on April 28, 1999, and denied a motion for rehearing on May 14, 1999. The decision of the Court of Appeals for the Seventh District of Texas at Amarillo filed on February 23, 1998, is reprinted in the Appendix hereto at p. 1a. The Petitioner is presently on bond.

STATEMENT OF JURISDICTION

The opinion of the Texas Court of Criminal Appeals from which petitioner Jackson seeks review was issued on April 28, 1999, and became final on May 14, 1999, when a motion for rehearing was denied by said Court. This petition is timely filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the Fourteenth Amendment, Section 1 to the United States Constitution and the Texas Code of Criminal Procedure provides:

Appellant Ronald Jackson relies upon the version of *article 32.01* in effect at the time of the offense and the return of the indictment which provided:

> *"When a defendant has been detained in custody or held to bail for his appearance to answer any criminal accusation before the district court, the prosecution, unless otherwise ordered by the court, for good cause shown, supported by affidavit, shall be dismissed and the bail discharged, if indictment or information be not presented against such defendant at the next term of the court which is held after his commitment or admission to bail."* Act of May 27, 1965, 59th Leg., R.S., ch. 722, 1, 1965 Tex. Gen. Laws 317, 441. The present version of *article 32.01* is applicable only to offenses after May 26, 1997. See Tex. Code Crim. Proc. Ann. *art. 32.01* (West Supp. 1999) (Act of May 12, 1997, 75th Leg., R.S., ch. 289, 2, 4, 1997 Tex. Gen. Laws 1304).

Article 28.061 in effect at the time provided:

> "If a motion to set aside an indictment, information, or complaint for failure to provide a speedy

trial is sustained, the court shall discharge the defendant. A discharge under this article or Article 32.01 of this code is a bar to any further prosecution for the offense discharged and for any other offense arising out of the same transaction, other than an offense of a higher grade that the attorney representing the state and prosecuting the offense that was discharged does not have the primary duty to prosecute." Act of May 20, 1977, 65th Leg., R.S., ch. 787, 4, 1977 Tex. Gen. Laws 1970, 1972 amended by Act of June 1, 1987, 70th Leg., R.S. ch. 383, 1, 1987 Tex. Gen. Laws 1985.

STATEMENT OF THE CASE

A. Ronald Jackson

Defendant was arrested for the offense of INTOXICATION MANSLAUGHTER on JANUARY 13, 1996. [R. 12] Within several hours, he was tested positive for alcohol. The victim died within several hours of the collision on January 13, 1996. He was not indicted until May 22, 1996. [R. 13] Vernon's Ann. Texas C.C.P. art. 32.01, 28.061. The Motion to Dismiss based on the failure to indict within 60 days or the next term of the Grand Jury was presented in a pretrial motion and denied by the Honorable Peter Michael Curry. [R. 118] The point was thus preserved for appellate review in its entirety.

During the Motion to Dismiss for Failure to File Timely Indictment, [Lisa Ramos—Court Reporter], TR 6-7, the Counsel for the State argued that the Defendant had to file an objection to the indictment before the indictment was presented to the Grand Jury and she based her argument on State v. Tatum, 505 S.W. 2d 548. In Tatum, the Defendant was arrested and then the indictment was dismissed by the State. Without a second arrest, the Defendant was reindicted. This was a case that did not involve an arrest before indictment. The arrest

was subsequent to the 2nd indictment and did not precede it.

In the case at bar, the facts are totally different. Ron Jackson was arrested on January 13, 1996, and the indictment came over four months later after an entire turn of the Grand Jury [March-April].

In Texas, when a defendant has been detained in custody or held to bail for his appearance to answer any criminal accusation before the district court, the prosecution, unless otherwise ordered by the court, for good cause shown, supported by affidavit, shall be dismissed and the bail discharged, if indictment or information be not presented against such defendant at the next term of the court which is held after his commitment or admission to bail.

Article 1, § 10, of the Constitution provides that in all criminal prosecutions the accused shall have a speedy public trial by an impartial jury, and that he shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof.

B. Opinion Below

The Seventh Court of Appeals in Amarillo stated in their opinion that the issuance of an indictment under article 32.01 did not occur until February of 1997. Since the pretrial hearing on the Motion to Dismiss for Failure to File Timely Indictment was held after the indictment was issued, the 7th Court of Appeals held that the issue became moot.

REASONS FOR GRANTING THE WRIT

The Amarillo Court has created and contributed to intolerable conflicts among the Courts of Appeal of the State of Texas.

Unfortunately, it does not appear that the Court of Appeals intends to resolve the split of authority between the courts of appeals. See *Condran*, 997 S.W.2d at 144-47 (Keller, J., dissenting); *Norton*, 918 S.W.2d at 3-4 (McCormick, P. J. and Keller, J., dissenting). Presiding Judge McCormick stated that the majority of the court believe that the issue was not worth reviewing in light of the 1977 amendments to *article 32.01* and *article 28.061*, which now render *article 28.061* inapplicable to a dismissal under article 32.01. *Norton*, 918 S.W.2d at 3. (McCormick, P. J., dissenting). The 1997 amendments were only applicable to an individual arrested after May 26, 1997, the effective date of the amendments. The former law remained in effect for arrest prior to that date. See Act of May 12, 1997, 75th Leg., R.S., ch. 289, 4, 1997 Tex. Gen. Laws 1304.

It is clear that we must apply the law in effect at the time Appellant Ronald Jackson was arrested. See *Fisk*, 958 S.W.2d at 509; *Ex parte Pena*, 955 S.W.2d 325, 327 (Tex. App.-San Antonio 1997, pet. ref'd).

By Failing To Dismiss A Defendant If Indictment Or Information Be Not Presented Against Such Defendant At The Next Term Of The Court Which Is Held After His Commitment Or Admission To Bail, Act Of May 27, 1965, 59th Leg., R.S., Ch. 722, The Amarillo Court Has Engendered A Conflict Among The Nation's State High Courts Regarding The Scope Of Federal And State Due Process Guarantees.

Unfortunately, it does not appear that the Court of Criminal Appeals intends to resolve the split of authority between the LOWER COURTS OF APPEALS causing a major disruption in the appellate court system.

With the 1987 amendment to *article 28.061* making it for the first time an enforcement mechanism for a dis-

missal under *article 32.01*, the various courts of appeals began to split as to the proper interpretation to be given to a dismissal under *article 32.01*. THE COURT OF CRIMINAL APPEALS MUST RESOLVE THIS SPLIT OF AUTHORITY BETWEEN COMPETING LOWER COURTS OF APPEALS.

According to certain case law *pre-May 26, 1997*, further prosecution is barred when an accused is arrested or released on bail and is not indicted by the grand jury within its next term of court, unless the State can show good cause for its failure to bring a timely indictment. Certain appellate courts began to hold that the Tatum rationale no longer applied in light of the 1987 amendment to *article 28.061*. *Ex parte Lawson*, 966 S.W.2d 532, 535 (Tex. App.-San Antonio 1996, no pet.) (overruling *Wilkinson v. State*, 899 S.W.2d 20 (Tex. App.—San Antonio 1995, pet. ref'd)); *Ybarra*, 942 S.W.2d at 38; *Norton v. State*, 918 S.W.2d 25, 28 (Tex. App.-Houston [—th Dist.] 1996), pet. dism'd improvidently granted, 969 S.W.2d 3 (Tex. Crim. App. 1998); *Ex parte Knight*, 904 S.W.2d 722, 725 (Tex. App.-Houston [1st Dist.] 1995, pet. ref'd).

As noted in the original appellate brief, weeks prior to the commencement of trial, and before the trial date, Appellant Ronald Jackson filed a "motion to set aside indictment for failure to afford constitutional right to speedy trial." In the motion, Appellant Ronald Jackson cited both the federal and state constitutional provisions as to the right of a speedy trial and included an additional reference to *article 32.01* of the Texas Code of Criminal Procedure. The hearing consisted of legal argument about the application of *article 32.01*. At the conclusion of the hearing, the trial court denied the motion, but never held that the motion came too late or that the State by affidavit had shown good cause for the delay.

Appellant Ronald Jackson now reurges such action was error. He relies upon the version of *article 32.01* in effect at the time of the offense and the return of the indictment which provided:

> *"When a defendant has been detained in custody or held to bail for his appearance to answer any criminal accusation before the district court, the prosecution, unless otherwise ordered by the court, for good cause shown, supported by affidavit, shall be dismissed and the bail discharged, if indictment or information be not presented against such defendant at the next term of the court which is held after his commitment or admission to bail."* Act of May 27, 1965, 59th Leg., R.S., ch. 722, 1, 1965 Tex. Gen. Laws 317, 441. The present version of *article 32.01* is applicable only to offenses after May 26, 1997. See Tex. Code Crim. Proc. Ann. *art. 32.01* (West Supp. 1999) (Act of May 12, 1997, 75th Leg., R.S., ch. 289, 2, 4, 1997 Tex. Gen. Laws 1304).

There is not rebuttal to the fact that the State of Texas, County of Bexar, failed to timely return the indictment under the then existing statute prior to May 26, 1996.

Appellant Ronald Jackson contends that a violation of *article 32.01* entitled him to a dismissal of the cause with prejudice because at the time *article 28.061* of the Code of Criminal Procedure was the enforcement mechanism for such violations.

Article 28.061 in effect at the time provided:

> "If a motion to set aside an indictment, information, or complaint for failure to provide a speedy trial is sustained, the court shall discharge the defendant. A discharge under this article or Article 32.01 of this code is a bar to any further prosecution for the offense discharged and for any other offense arising out of the same transaction, other than an

> offense of a higher grade that the attorney representing the state and prosecuting the offense that was discharged does not have the primary duty to prosecute." Act of May 20, 1977, 65th Leg., R.S., ch. 787, 4, 1977 Tex. Gen. Laws 1970, 1972 amended by Act of June 1, 1987, 70th Leg., R.S. ch. 383, 1, 1987 Tex. Gen. Laws 1985.

Article 28.061 was declared unconstitutional in *Meshell v. State*, 739 S.W.2d 246, 257 (Tex. Crim. App. 1987). *Meshell* held that the *Texas Speedy Trial Act* (*Tex. Code Crim. Proc. art. 32A.02*) violated the separation of powers doctrine (Tex. Const. art. II, 1). *Meshell*, 739 S.W. 2d 257. However, the legislature's 1987 amendment to *article 28.061* after the Texas Court of Criminal Appeals' decision in *Meshell*, as set out above, made the statute a viable enforcement statute for *article 32.01* since the statutory language included article *32.01* whereas the earlier version of article *28.061* had not. Article *28.061* was earlier declared unconstitutional only in its capacity as an enforcement mechanism for the *Speedy Trial Act*. The 1987 amended version survived *Meshell* insofar as it applied to *article 32.01* prior to its 1997 amendment and is applicable to Appellant Ronald Jackson's case if there was in fact a violation of *article 32.01* at the time and prior to its 1997 amendment.

Article 32.01 has been a part of the codes of criminal procedure in Texas. See *Ex parte Lerma*, 317 S.W.2d 751, 752 (Tex. Crim. App. 1958); *Ex parte Johnson*, 154 S.W.2d 854, 855 (Tex. Crim. App. 1941); *Payne v. State*, 4 S.W.2d 53, 54 (Tex. Crim. App. 1928). The version of the statute set out above as applicable to Appellant Ronald Jackson's case has been held constitutional. *Ex parte Mallares*, 953 S.W.2d 759, 762-63 (Tex. App.-Austin 1997, no pet.).

In 1974, the Court of Criminal Appeals held that *article 32.01* had no application once an indictment is returned, although it is returned by a grand jury subsequent to the next term of court after the defendant was held to bail or detained in custody. *Tatum v. State,* 505 S.W.2d 548, 550 (Tex. Crim. App. 1974). At the time of *Tatum, article 28.061* was not in existence. Under the Tatum interpretation of *Article 32.01,* the State was free to refile the charges once the case had been dismissed under that statute. See *Fisk v. State,* 958 S.W.2d 506, 507 (Tex. App.-Texarkana 1997, pet. ref'd). The dismissal was without prejudice. Thus, the defendant was provided only temporary relief until the State refiled the charges. See *State v. Ybarra,* 942 S.W.2d 35, 38 (Tex. App.-Corpus Christi 1996), pet. dism'd improvidently granted, 977 S.W.2d 594 (Tex. Crim. App. 1998). The *Tatum* decision was a consistent interpretation of the statute by the Court of Criminal Appeals.

With the 1987 amendment to *article 28.061* making it for the first time an enforcement mechanism for a dismissal under *article 32.01,* the various courts of appeals began to split as to the proper interpretation to be given to a dismissal under *article 32.01.* According to certain case law, further prosecution is barred when an accused is arrested or released on bail and is not indicted by the grand jury within its next term of court, unless the State can show good cause for its failure to bring a timely indictment. See *Ybarra,* 942 S.W.2d at 36. Certain appellate courts began to hold that the *Tatum* rationale no longer applied in light of the 1987 amendment to *article 28.061.* See, e.g., *Ex parte Lawson,* 966 S.W.2d 532, 535 (Tex. App.-San Antonio 1996, no pet.) (overruling *Wilkinson v. State,* 899 S.W.2d 20 (Tex. App.-San Antonio 1995, pet. ref'd)), *Ybarra,* 942 S.W.2d at 38; *Norton v. State,* 918 S.W.2d 25, 28 (Tex. App.-Houston

[—th Dist.] 1996), pet. dism'd improvidently granted, 969 S.W.2d 3 (Tex. Crim. App. 1998); *Ex parte Knight*, 904 S.W.2d 722, 725 (Tex. App.-Houston [1st Dist.] 1995, pet. ref'd).

Other courts of appeals have continued to follow Tatum and hold that the proper remedy for the unindicted accused is to seek and obtain a ruling on an article 32.01 motion prior to indictment. See, e.g., *Steinmetz v. State*, 968 S.W.2d 427, 432 (Tex. App.-Texarkana 1998, no pet.); *Ex parte Barnes*, 959 S.W.2d 313, 320 (Tex. App.-Fort Worth 1997, pet. granted); Fisk, 958 S.W.2d at 509; *State v. Condran*, 951 S.W.2d 178, 191-92 (Tex. App.-Dallas 1997) (holding in part that the 1987 version of *article 28.061* was unconstitutional), pet. dism'd improvidently granted, 977 S.W.2d 144 (Tex. Crim. App. 1998); *Hollman v. State*, 945 S.W.2d 232, 235-36 (Tex. App.-Amarillo 1997, no pet.).

In *Ex parte Crowder*, 959 S.W.2d 732 (Tex. App.—Austin 1998, pet. ref'd), the applicant sought habeas corpus relief following indictment, using *article 32.01* as the basis for his claim to the right of dismissal of the charge against him. The Court pointed out that by its express terms, *article 32.01* is restricted to persons who are (1) restrained for an offense and (2) not charged by an indictment or information at the conclusion of the next term of court. Citing Tatum, we stated: "when Crowder first invoked *article 32.01* after he was indicted, however, he invoked a statute that no longer applied to his circumstances by its very terms—he was no longer restrained in the absence of an indictment or information." *Crowder*, 959 S.W.2d at 733. Habeas corpus relief was denied.

CONCLUSION

Unfortunately, it does not appear that the Court of Criminal Appeals intends to resolve the split of authority between the courts of appeals. *See Condran*, 977 S.W.2d at 144-47 (Keller, J., dissenting); *Norton*, 918 S.W.2d at 3-4 (McCormick, P. J. and Keller, J., dissenting). Presiding Judge McCormick stated that the majority of the court believe that the issue was not worth reviewing in light of the 1997 amendments to *article 32.01* and *article 28.061*, which now render *article 28.061* inapplicable to a dismissal under *article 32.01*. *Norton*, 918 S.W.2d at 3. (McCormick, P.J., dissenting). The 1997 amendments were only applicable to an individual arrested after May 26, 1997, the effective date of the amendments. The former law remained in effect for arrest prior to that date. See Act of May 12, 1997, 75th Leg., R.S., ch. 289, 4, 1997 Tex. Gen. Laws 1304.

It is clear that we must apply the law in effect at the time Appellant Ronald Jackson was arrested. See *Fisk*, 958 S.W.2d at 509; *Ex parte Pena*, 955 S.W.2d 325, 327 (Tex. App.—San Antonio 1997, pet. ref'd).

Respectfully submitted,

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APPENDIX

No. 07-97-0263-CR

IN THE COURT OF APPEALS
FOR THE SEVENTH DISTRICT OF TEXAS
AT AMARILLO

PANEL B

February 23, 1998

RONALD JACKSON,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 290th District Court of Bexar County;
No. 96CR2576; Honorable Sharon MacRae, Judge

Before BOYD, C.J., and DODSON and QUINN, JJ.

Ronald Jackson, appeals from a judgment convicting him of intoxication manslaughter under § 49.08 of the Texas Penal Code. His sole point of error involves whether the trial court erred in refusing to dismiss the prosecution since the State allegedly failed to timely indict him under article 32.01 of the Texas Code of Criminal Procedure. We affirm.[1]

According to article 32.01 of the Code of Criminal Procedure, when a defendant has been detained in custody or held to bail to answer a criminal accusation before the district court, "the prosecution, unless otherwise

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[1] Although oral argument was requested, this case was appropriate for review on the briefs alone. TEX. R. APP. P. 39.8.

ordered by the court, for good cause shown, supported by affidavit, shall be dismissed and the bail discharged, if indictment or information [is] not presented . . . [at] the next term of the court which is held after his commitment or admission to bail." TEX CODE CRIM. PROC. ANN. art. 32.01 (Vernon 1998). Yet, issuance of the indictment before a court adjudicates whether article 32.01 was violated moots the subject. *Tatum v. State*, 505 S.W.2d 548, 550 (Tex. Crim. App. 1974); *Holleman v. State*, 945 S.W.2d 232, 236 (Tex. App.—Amarillo 1997, no pet.); *but see Norton v. State*, 918 S.W.2d 25 (Tex. App.—Houston [14th Dist.] 1996, pet. granted) (suggesting otherwise).[2]

Here, appellant was indicted in May of 1996. However, his attempt to dismiss the indictment under article 32.01 did not occur until February of 1997. Since the indictment had issued long before any court convened to adjudicate whether the State complied with article 32.01, the dispute became moot. *Tatum v. State, supra*; *Holleman v. State, supra*. Moreover, appellant's reliance upon the Federal Speedy Trial Act, 18 U.S.C. § 3161(b) does not affect our determination for that act does not apply to state criminal prosecutions. *Kimmell v. Leoffler*, 791 S.W.2d 648, 652 (Tex. App.—San Antonio 1990, writ denied) (the federal act has no application unless there is a federal arrest); *see also United States v. Mills*, 964 F.2d 1186, 1188-90 (D.C. Cir. 1992), *cert. denied*, 506 U.S. 977 (1992).

Accordingly, we affirm the judgment.

BRIAN QUINN
Justice

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[2] We held, in *Holleman v. State*, 945 S.W.2d 232 (Tex. App.—Amarillo 1997, no pet.), that *Norton* was incorrectly decided and continue to so hold.

CCA Clerks System v 3.0- Active Files Event # 7 of 7

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v [ ]
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County [Bexar] Court Name [290TH DISTRICT COURT]

Date	Proc	Event	Desc	Disposition	Oral	Loc
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06/04/1998		NO RESPONSE FILED	STA			BG5
07/17/1998		WORKUP COMPLETE				MEL
04/28/1999		PDR DISP	APP	REFUSED		CLK
05/14/1999		REHEAR RECEIVED	APP			CLK
05/14/1999		REHEAR REJECTED	APP			CLK
05/14/1999		FINAL DISP	APP	REFUSED		COA

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